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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1944

FORD WHOLESALE COMPANY, INC.,
Petitioner,

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent, Fibreboard Corporation (formerly known as Fibreboard Paper Products Corporation and hereinafter referred to as "Fibreboard") opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed with this Honorable Court on or about June 29, 1974 (hereinafter referred to as the "petition"). The petition is wholly devoid of any merit. This is revealed not only by its contents and the analysis presented herein but by the fact that petitioner, *Ford Wholesale Company, Inc.*, a California corporation, while

a party to related litigation heretofore dismissed by the United States District Court for the Northern District of California[1], and affirmed by the United States Court of Appeals for the Ninth Circuit[2], for lack of diligent prosecution by Ford Wholesale Company, Inc., *is not a party to the case for which review is sought by the instant petition.* The plaintiff and appellant below in the case for which review is sought by this petition is a *different* corporation, *Ford Wholesale Company, Inc. of San Jose,* a California corporation, which is evident from the case titles of the opinions below reprinted as appendices to the petition and from the opinions below as reported.[3]

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California in *Ford Wholesale Company, Inc. of San Jose v. Fibreboard Paper Products Corporation* is reported at 344 F. Supp. 1323, and the opinion of the United States Court of Appeals for the Ninth Circuit in *Ford Wholesale Company, Inc. of San Jose v. Fibreboard Paper Products Corporation* is reported at 493 F.2d 1204.

JURISDICTION

It is submitted that the jurisdiction of this Court has *not* been invoked pursuant to 28 U.S.C. § 1254 because the petitioner herein, Ford Wholesale Co., Inc., was not a

1. Ford Wholesale Company, Inc. v. Fibreboard Corporation, No. C-48911 RHS, U.S.D.C., N.D. Calif.
2. Ford Wholesale Company, Inc. v. Fibreboard Corporation, No. 71-2819, affirmance of dismissal with prejudice issued February 20, 1974.
3. Because of several inaccuracies in the reprint of the opinions below contained in the Appendices of the petition, we hereinafter cite to the official reports of these opinions.

party below[4] and has no standing to seek review of the decision below, and the time allowed for filing of a petition for writ of certiorari by 28 U.S.C. § 2101(c) on behalf of a party to the case below has expired as of July 5, 1974,[5] without any application for extension.

In any event, this case is not an appropriate subject under the criteria of Rule 19(1)(b) of the Supreme Court Rules since: (a) there is no conflict with a decision of another court of appeals presented by this decision; (b) no territorial or state law question is involved; (c) no unsettled question of federal law is involved; (d) nor is any conflict with applicable decisions of this Court presented by the decisions of the lower courts in this case.[6]

STATUTES INVOLVED

The *only* statute involved is Section 1 of the Sherman Act (15 U.S.C. § 1), which is set forth in the petition, page

4. 28 U.S.C. § 1254, whereunder petitioner claims the valid invocation of this Court's jurisdiction (Petition, p. 2), provides that cases in the courts of appeals may be reviewed by the Supreme Court: "(1) By writ of certiorari granted upon the petition of *any party* to any civil or criminal case, before or after rendition of judgment or decree".

5. 28 U.S.C. § 2101(c) provides that any writ of certiorari intended to bring a judgment in a civil action before this Court for review "shall be . . . applied for within ninety days after the entry of such judgment or decree. In this case that ninety days began to run on April 5, 1974, when the Court of Appeals denied rehearing (Petition, Appendix C; Dept. of Banking v. Pink, 317 U.S. 264, 266 (1942).

6. Petitioner has, by page 6 of the petition, altered substantially its own first-stated version of the question presented (Petition, p. 3) to "the sole question presented by this petition is whether there was evidence from which the jury could have found [even though the jury never considered it] that interstate commerce was involved". Petitioner invites this Honorable Court to survey whether "on a reading of the record, the evidence is sufficient". If that be so, there is no semblance of qualification for consideration by this Court of petitioner's bid for another appellate review of the record evidence.

3. We do not agree, nor does either version of the question presented as stated by petitioner (Petition, pp. 3, 6) agree, that Section 2 of the Sherman Act is or could be in any way involved.

QUESTION PRESENTED

The sole question considered and decided by the Court of Appeals was whether the trial court was clearly erroneous in assessing that the evidence presented by petitioner on the involvement of the acts complained of in the flow of interstate commerce was too insufficient, insubstantial and lacking in probative value to warrant a finding by the trial court, as the agreed upon trier of fact on this issue, of the requisite involvement in interstate commerce.

STATEMENT OF THE CASE

Accepting petitioner's statement of the nature of the case (Petition, pp. 3-4), Fibreboard offers the following alternative and, it submits, more complete statement of the facts of the case and the proceedings below.

(A) Background of the Case

This case arises out of the deterioration and termination of Fibreboard's relationship with Ford[7] as a wholesale distributor of PABCO Asphalt Roofing Products in the fall of 1963. Fibreboard manufactured PABCO products until August, 1968, in its Portland, Oregon, plant and in its California regional plants at Martinez, Emeryville and Wilmington (near Long Beach). Fibreboard marketed PABCO products in the San Francisco Bay six counties area through 15 designated wholesale distributors. From 1961 until De-

7. We hereinafter refer to Ford Wholesale Co., Inc. of San Jose, a California corporation, as "Ford" and continue to refer to petitioner Ford Wholesale Co., Inc., as "petitioner".

cember, 1963, Ford was a wholesale distributor of PABCO Asphalt Roofing Products[8] in the San Francisco Bay six counties area. As of December, 1963, Ford, along with its affiliate corporations, who had acted as Fibreboard's sole wholesale distributors in Southern California since 1960 and were controlled by the same stockholders (T. 443-44, 589-90, 595-96)[9], was terminated effective at the end of the year as a wholesale distributor of PABCO Asphalt Roofing Products by written notice given in late October, 1963. (Exh. 7; R. 422-23, 433-35, 1018-19; T. 396.)

The termination was precipitated by Ford's effort to establish a warehouse inventory of PABCO and a distribution outlet in Oakland, California, in October, 1963. Fibreboard, who had sold PABCO F.O.B. its San Francisco Bay Area plants to San Jose and San Francisco warehouse outlets of Ford in 1961 and 1962, refused to sell PABCO to Ford's new Oakland outlet on the basis of its expressed business judgment that its East Bay distribution of PABCO was firmly adequate through the five existing East Bay warehouse outlets, operated by the originally named co-defendant distributors, States Shingle Co., Wholesale Building Supply Co., and Pacific Cement and Aggregates[10], and

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8. The distributorship arrangement was memorialized in Fibreboard's Merchandising Policy for Asphalt Roofing Products (Exh. 2; T. 102, 104) and covered standard asphalt shingles, roll roofing and felts; bonded line asphalt shingles and roll roofing; roof coatings, cements and asphalt emulsions; and PABCO-WEB roofing.

9. Fibreboard has adopted throughout this brief the system of citations to the record on appeal followed by petitioner (Petition, pp. 4, 7 nn. 1 and 2) and also cites the documentary exhibits of record as "Exh.".

10. These named co-defendants were all dismissed before or during trial. Pacific Cement and Aggregates ("PCA") was sued through its successor corporation, Lone Star Cement, and was dismissed by stipulation at an early stage (R. 195.) States Shingle Co. ("States") was insolvent at the time of trial, and was dismissed during trial by stipulation. Wholesale Building Supply Co. ("WBS") was also dismissed at the same time as States. (T. 213; R. 638-39.)

its concern over the dominating role Ford and its affiliates had assumed in its overall California distribution of PABCO. (T. 592, 600.) As it had done before, Fibreboard continued to sell full load or split load drop-shipment lots to Ford bound for delivery points in the East Bay. (T. 463-64.) Ford contended that this refusal to sell PABCO to Ford's third outlet in the San Francisco Bay Area and the eventual termination of Ford and its affiliates as PABCO Asphalt Roofing Products wholesale distributors, was induced by pressure and threats against Fibreboard from States and WBS, even though Ford and its affiliates accounted for three times the PABCO products distribution volume of States and WBS combined. (Exhs. 16, 17; T. 528-29, 688-89.) The termination occurred after Ford diverted several shipments of PABCO products from their intended drop-delivery destinations in the East Bay to stock its Oakland warehouse and had threatened to terminate its and its affiliates' distributorships for PABCO products all over California if Fibreboard would not initiate sales to Ford's Oakland warehouse inventory. (T. 593-600.)

Immediately after termination notice was given Ford took on distributorships for Lloyd Frye roofing products, Celotex roofing products and, later, Pioneer Flintkote roofing products—all competitive with PABCO Asphalt Roofing Products. (T. 714-15.) In each of the years after termination in which Ford claimed damage from loss of profits, Ford's sales were higher and its gross profits were higher than in any year in which it distributed PABCO prior to termination by Fibreboard. (Exhs. L, M, 19; T. 827, 831, 836, 653-654, 758-59.)

(B) The Proceedings in the Trial Court

Ford initially filed suit in the United States District Court for the Central District of California in January,

1965. (R. 95.) After considerable discovery was taken and the Central District court case was transferred to the Northern District of California, Ford refiled in the United States District Court for the Northern District of California, adding States, WBS and Lone Star Cement (PCA) as defendants, in November, 1966. (R. 79.) After considerably more discovery was taken by Ford, its counsel filed a pretrial statement in February, 1970, representing that all discovery for Ford was completed and that Ford needed no further trial preparation. (R. 265.) No further discovery by Ford was, in fact, taken.

Fibreboard adopts, as further statement of the proceedings in the trial court, petitioner's statement on pages 4 and 5 of the petition down to the last paragraph on page 5, except to add that Fibreboard's two motions for a directed verdict and to strike Ford's damage evidence were made at the close of Ford's case and at the close of all the evidence on the additional grounds of inadequacy of the evidence to support a verdict for Ford, in various particulars. (T. 802-03; 916-17.)

Throughout the presentation of Ford's case, and in chambers at the session on jury instructions, discussed by the trial court's opinion (344 F. Supp. at 1325) Fibreboard maintained the position that Ford's evidentiary demonstration on interstate commerce involvement was inadequate, as a matter of law and the trial court was bound to rule for Fibreboard on its motion for a directed verdict because of this essential discrepancy. (R. 627-33.) If Fibreboard were wrong in that position, the trial court would have then determined that there was sufficient evidence for reference of the matter to the jury. However, Ford

withdrew its instruction and advised the court that it acquiesced in withdrawing the issue from the jury.[11]

(C) The Evidence Offered of Involvement with Interstate Commerce.

The trial court found as a fact that Ford purchased the PABCO Asphalt Roofing Products it resold pursuant to its distribution agreement with Fibreboard in the six Bay Area Counties from Fibreboard's Bay Area plants, where they were manufactured. (344 F.Supp. at 1325) As much was admitted by witness Thomas, Ford's president, when he acknowledged (T. 434) that the PABCO that Ford bought from Fibreboard was manufactured in California. There never was any evidence introduced that *any* Fibreboard product purchased by Ford was manufactured out of state.[12] What little evidence Ford introduced as to out-of-state purchases or sales falls into four categories:

1. Roofing insulation material—not manufactured by Fibreboard and not one of the asphalt roofing products for

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11. The lower court had every basis to interpret this move as a stipulation that "the court, not the jury, should make the ruling upon the interstate commerce issue in this case". (344 F.Supp. at 1325.) Petitioner appears to agree with that view on the court's part also (Petition, pp. 5-6), but it draws the perfect nonsequitur conclusion from it: "If on a reading of the record the evidence is sufficient for submission to the jury, then—in this case—plaintiff has satisfactorily established a restraint on interstate commerce." To the contrary, with the lower court acting as trier of this fact issue by stipulation, its determination can only be overturned if clearly erroneous. Federal Rule of Civil Procedure 52(a).

12. Petitioner is erroneous in its representations as to the "undisputed facts" in the Pretrial Order (R. 433-36). There it was admitted that Fibreboard manufactured roofing products in Oregon and that Fibreboard "has manufactured and sold roofing products outside the State of California". (R. 434—emphasis added.) There is no basis in these admitted facts for petitioner's conclusion that it was "clear . . . prior to trial that some of these Oregon produced roofing materials were shipped across state lines from Oregon to the relevant market in California". (Petition, p. 9.)

which Ford acted as a wholesale distributor of PABCO—which was purchased by Ford both from Fibreboard, as middleman, and directly from the manufacturers, Kaiser and U.S. Gypsum. The termination of Ford as a PABCO distributor didn't bear on this material,[13] and as the trial court found as a matter of fact, Ford's purchases of non-PABCO material continued after termination by Fibreboard much the same as they had before. (T. 711-14; 344 F.Supp. at 1327.)[14]

2. Roofing materials manufactured by Fibreboard in Portland, Oregon and, purportedly when local production fell short, shipped into the Martinez plant inventory. As the trial court found as a matter of fact, no evidence was introduced to show: (1) that Ford ever bought any such material; (2) that any such shipments ever occurred when Ford was a PABCO distributor; (3) in what quantity, if any, such material purportedly moved into Martinez general inventory; or (4) whether any of it was material covered by the subjects (See Exh. 2; T. 102, 104) of Ford's distributorship. (344 F.Supp. at 1327.) Moreover, as the trial court also found, no evidence was elicited to the effect that any transfers were made pursuant to specific orders placed by Ford or to serve the anticipated needs of Ford

13. Exhs. 2, 7; T. 102, 104, 396. The termination notice stated to Ford "your distributorship for our roofing products is hereby terminated," and the wholesale distributorship policy statement, under which Ford operated as a distributor for PABCO (T. 103-05), covered no roofing insulation material at all. (344 F.Supp. at 1327.) Neither the Complaint (R. 3-6) nor the Pretrial Order (R. 434-36) raised any issue as to restraint of trade in non-PABCO roofing products.

14. The reprint of the opinion of the trial court, Appendix A to the petition, is in error. The last sentence of part "(1)" on p. vii of Appendix A to the Petition should read "There is, *on* the other hand, evidence that, after Fibreboard's termination of Ford as one of its wholesale distributors, Ford continued to obtain the insulation material (etc.)."

or that Ford's termination had the slightest bearing on any such shipments in any respect. (*Id.*, p. 1328, n.2.)

3. Sales by Ford to roofing contractors for out-of-state job sites. In the first place, the pretrial order stipulated that Ford's business of the marketing, selling and distribution of roofing products was confined to the six San Francisco Bay Area counties. (R. 433.) The trial court, therefore, properly disregarded evidence contrary to that undisputed fact. What was offered, moreover, was testimony of Ford's president that *Ford* sometimes shipped *its* materials outside California, with no specification of whether any of it was material that was covered by the terminated PABCO wholesale dealership arrangement or when any such shipment occurred.

Ford's sole Sales Manager since its inception (T. 269) recalled only a single instance of a sale for a Nevada job site during the entire relevant period (T. 278) and not one single sale to a retail distributor located out of state (T. 277.)

4. Other purchases of accessory items by Ford from out-of-state suppliers. There was testimony that, like any business in modern life, Ford purchased an array of items for resale from wholly unrelated suppliers. (T. 431-34.) None of these purchases or materials were alleged to be competitive with Fibreboard's products or in any way related to Ford's distributorship of PABCO. The fact of their purchase, there being no claim of alteration or effect by Ford's shift from the PABCO to the Fry and Celotex lines of asphalt roofing, was simply irrelevant to the interstate commerce involvement *of the acts complained of*, and it was properly so treated by the trial court.

From this thin fare, which we review in further detail below, Ford argued it had demonstrated that the acts com-

plained of occurred *in the flow of* interstate commerce—eschewing any attempt to qualify its case under the alternative theory of purely local restraint which "substantially affects" interstate commerce.[15]

The Court of Appeals for the Ninth Circuit reviewed the trial court's opinion and appraisal of the evidence and found the trial court's decision in entering judgment notwithstanding the verdict for Fibreboard for lack of sufficient proof of involvement of the acts complained of in interstate commerce to have been correct. (493 F.2d 1204.) Moreover, the Court of Appeals unanimously declined to reconsider upon application for rehearing *en banc*. (Petition, App. C.) Petitioner now resorts to this Honorable Court for remedy of Ford's failure at the trial level to elicit sufficient evidence to prove the essential element of involvement of the acts complained of in interstate commerce. Realizing the office of this Court to be concern with substantial questions of law of national significance rather than the review of evidentiary materials to determine whether the quantum of evidence has been properly appraised by a lower trial court and the court of appeals in a given case, we, nevertheless, respond to petitioner's one-sided portrayal of the evidence (Petition, pp. 11-16), such as it was, presented to the trial court on the issue of involvement of the acts complained of in the flow of interstate commerce.

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15. Ford's counsel stated to the lower court in argument on the motion for judgment N.O.V. (T. 1127):

"THE COURT: So you take the position . . . .

MR. BLECHER: This is an in flow case.

THE COURT: This is an in flow case, that is your position?

MR. BLECHER: Correct. Now, let me show what the evidence is on this case."

The trial court concluded from this that there was no claim that Ford had demonstrated, or could demonstrate, an actual effect on interstate commerce by reason of its termination by Fibreboard. (344 F.Supp. at 1325.)

1. THE EVIDENCE OF INTERSTATE SHIPMENT AND PURCHASE BY FORD OF ROOFING INSULATION

The *only* testimony bearing on purchases of roofing insulation by Ford through Fibreboard was that of witness Thomas set forth in the petition at pages 14 and 15. However, Thomas also testified immediately thereafter that Ford bought roofing insulation material directly from Kaiser in substantial quantities during the same period while handling PABCO products. (T. 430-33):

> "Q. All right. Now, were there any materials that, independently of Fibreboard, and during the period that you had their products, you purchased from suppliers located outside the State of California?
>
> A. Yes, sir. Many of them.
>
> Q. Would you name some of the items you bought and the approximate quantities of your purchase?
>
> • • •
>
> THE WITNESS: During the period of 1961 through 1963, that period that we handled Fibreboard or PABCO, we purchased materials from Carey Company. We shipped from the East a number of plants. We purchased the material directly from the Kaiser Company that shipped from Oregon. We purchased material from Keystone Steel and Wire, which shipped from Illinois—
>
> • • •
>
> MR. BLECHER: Q. Can you list for us the names of the principal manufacturers who supplied you such items, Mr. Thomas?
>
> A. Kaiser Company.
>
> Q. And what was the item?
>
> A. Roofing insulation.
>
> Q. And did you buy this in substantial quantities?
>
> THE COURT: Where do they manufacture?
>
> THE WITNESS: In Oregon.
>
> THE COURT: And they ship down here?

THE WITNESS: Yes, sir.

MR. BLECHER: Q. And did you sell this along with PABCO roofing materials on jobs in California?

A. Yes, sir, we did.

MR. BLECHER: Q. PABCO didn't make roof insulation is that right?

A. No, Sir.

Q. So you had, in order to sell a complete line of items to put on a roof—you had to buy certain items that PABCO didn't have?

A. Yes.

Q. This is what we're talking about?

A. Yes.

Q. One is called "insulation"?

A. Yes.

Q. You bought that from Kaiser?

A. It was made in Oregon or Washington, yes."

Mr. Ornelias, Ford's Sales Manager, testified also that from Ford's inception in 1960 and continuing through and after its association with PABCO products Ford "represented" Kaiser in insulation and various other products. (T. 271.)

It was also further elicited from witness Thomas that non-asphalt roofing accessory items, including roofing insulation, comprised about the same percentage of Ford's sales after termination as they had before termination. (T. 712-13.) These sales increased after termination (Exh. L; T. 826-27, 831).

The most salient point, however, is that roofing insulation *was not the subject of this lawsuit.* Fibreboard (PABCO) made no roofing insulation; Ford's distributorship for PABCO covered asphalt roofing products, but that distributorship, the alleged "pressures" from Ford's competitors, and Ford's eventual termination as a distributor

of PABCO by Fibreboard did *not* involve roofing insulation (Exh. 2; T. 102, 104); no claim was ever made, nor was evidence introduced, that Fibreboard ever refused to sell roofing insulation materials to Ford or anyone else; and there was no claim that Fibreboard or anyone else conspired to restrain trade in roofing insulation manufactured by Kaiser or some other entity. (R. 3-6.)

The roofing insulation, therefore, stands as an example of Ford's interstate business, perhaps, but it has no value in demonstrating that Fibreboard committed acts within or affecting the interstate commerce part of Ford's business.[16]

2. THE EVIDENCE OF INTERSTATE MOVEMENT OF PABCO PRODUCTS FROM OREGON TO CALIFORNIA

Not one of the Ford owners and officers who testified said one word about Ford having bought any PABCO products manufactured in Oregon. Neither did any other witness. Ford bought from the Martinez or Emeryville, California, plant general inventory, which was manufactured right on the site. Witness Thomas, Ford's president, so confirmed in his testimony. Immediately following the testimony quoted above, concerning Ford's purchases of roof insulation, and testimony of Ford's purchases of other accessory products from out-of-state suppliers, the following colloquy with the trial judge occurred (T. 434):

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16 As stated in Page v. Work, 290 F.2d 323, 330 (9th Cir. 1961), cert. denied, 368 U.S. 875, the criterion is "not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." See also Von Kalinowski, Antitrust Laws and Trade Regulation, § 5.01[1] [2], p. 5-3 (1969); Gough v. Rossmoor Corporation, 487 F.2d 373, 376 (9th Cir. 1973); In Re Western Liquid Asphalt Cases 487 F.2d 202, 204 (9th Cir. 1973); Yellow Cab Co. of Nevada v. Cab Employees, etc. 457 F.2d 1032, 1034 (9th Cir. 1972); Lieberthal v. North Country Lanes, Inc. 332 F.2d 269, 272 (2nd Cir. 1964); United States v. The Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970).

"THE COURT: Yes. As far as the Fibreboard product, that you bought from Fibreboard. That was PABCO. As I understand, they were manufactured in California?

THE WITNESS: Yes, sir. They were."

That is the *only* testimony in the record concerning the origin of the PABCO products *bought by Ford*. Even though relevant documentary material was made available to Ford's counsel during the trial (R. 954-55) none of it was ever offered or alluded to by Ford.

Now petitioner relies on the brief testimony of witnesses La Plant and Hoover for establishing a "flow of commerce" from Portland, Oregon, to the Bay Area PABCO distributors. (Petition, pp. 11-13.) Mr. La Plant's testimony, as quoted (*Id.*, pp. 11-12), amounts to no more than affirmance that at some time in his nine years of experience between 1956 and the end of 1963, as the Alameda County salesman, he knew that some materials were shipped from the Portland plant for Bay Area distributors.[17] Mr. La Plant's experience related to the Alameda County distributors only (T. 57, 60, 61)—States, WBS and PCA. Fibreboard was selling to Ford in the East Bay on a drop shipment or full load shipment basis only (T. 149, 274-75, 463-64), therefore it is quite consistent for Mr. La Plant to have stated that his knowledge of shipments from Portland, on occasion, related to items destined for States—an East Bay outlet distributor—and to testify, as he did, that he "couldn't say" as to any such shipment being made to Ford. (T. 80.) It should also be noted that the context of this testimony was that it was "incidentally" brought up in the course of

17. Counsel's question was whether "*any* materials produced at . . . the Portland, Oregon plant were *ever* delivered down here for distribution to wholesalers". (Petition, p. 11, emphasis added.)

a discussion about a temporary product shortage from the Martinez facility when it first opened. Thus, the testimony immediately preceding that quoted by Ford is (T. 80):

> "A. No, there were shortages from time to time, but this was a particularly bad shortage.
>
> Q. This was the one occasioned by the fact that you had just started operation of a new plant and there were some bugs in the plant and you were falling behind on your production schedule?
>
> A. That's correct.
>
> Q. Ultimately you got the bugs out?
>
> A. Yes."

Thus, La Plant's testimony showed no knowledge of any "flow" of PABCO products from Portland, Oregon, to Ford, and its context related to the problem of meeting a situation of temporary short supply from the local production plant, which was rectified.

The subsequent testimony by witness Hoover does not support any inference of shipments to Ford from Portland. Moreover, it is simply false to characterize that testimony as stating that the Portland, Oregon, plant supplied any part, let alone the "second largest source of supply" (Petition, p. 12), for the San Francisco Bay Area. What Mr. Hoover testified was that he didn't know that any PABCO products were shipped from Portland, Oregon to the San Francisco Bay Area. Mr. Hoover's full testimony on this matter is (T. 181-83):

> "Q. Incidentally, did any of these—any of the products that were sold by the distributors in the Bay Area come into this area from your Portland, Oregon plant from time to time?
>
> A. I don't know that they did.
>
> THE COURT: Now, you testified a little while ago, as I recall, you manufactured these materials at Martinez.

THE WITNESS: Yes, but we also had two more manufacturing plants. One was in Portland, Oregon and one was in Wilmington in the Los Angeles area.

THE COURT: Well, do you know from what plant the building materials—what plant of yours the building materials were shipped into for the East Bay Area?

THE WITNESS: Well, the greatest bulk of them would come out of Martinez.

THE COURT: All right. And what about the residue after the greatest bulk from Martinez?

THE WITNESS: Well, that is the point. They may have been shipped from Portland. Some may have.

THE COURT: What do you mean 'may have'.

THE WITNESS: I don't know any specific instances.

THE COURT: How about Wilmington?

THE WITNESS: From time to time, I'm sure that there were, but I could not name a specific instance.

THE COURT: From Wilmington, California?

THE WITNESS: I can't name any at the moment.

MR. BLECHER: Q. Were some items in the line Mr. Hoover made only in Portland? Certain kinds of wood shingles—

A. I don't believe so.

Q. Well—

A. Not to my knowledge at the moment.

Q. Well, Mr. La Plant told us yesterday that the Portland Plant shipped materials down into the Bay Area. Would you dispute that?

A. No.

Q. You would be willing to accept that as accurate?

MR. ELDERKIN: Well, Your Honor, Mr. La Plant's testimony—

THE COURT: You don't have to accept that".

Mr. Hoover's testimony on this subject added exactly nothing to the evidence. Whereas, Mr. Hoover was of the opinion that, from time to time, some materials were shipped into the San Francisco Bay Area from Wilmington,

California, he could not say the same as to any shipments from Portland, Oregon.[18]

Thus, the lower court was fully warranted in finding, as it did (344 F. Supp. 1327, 1328) that:

(1) No evidence showed when or in what amount any PABCO materials came into the San Francisco Bay Area from Portland, Oregon;

(2) No evidence showed that any of the materials supposedly brought in were those, or included in those, which were the object of Ford's distributorship for PABCO (Exh. 2; T. 102, 104); and

(3) No evidence showed that Ford ever ordered or received any such material or that its termination could have possibly had any influence on its movement.

Like the roofing insulation category, the supposed Portland, Oregon-San Francisco Bay Area transfer of PABCO products is not relevant to the issue. If the evidence were adequate to show that any such movement, in fact, took place other than only on select occasions, it might demonstrate an interstate aspect of Fibreboard's business. In doing so, however, it would not thereby demonstrate an effect on the interstate aspect of that business, let alone Ford's business, as a result of the termination complained of.[19]

3. THE EVIDENCE OF OUT-OF-STATE SALES BY FORD

Petitioner relies upon witness Thomas' testimony[20] that

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18. This Court judicially knows that highway mileage from Portland, Oregon to the San Francisco Bay Area (approx. 650 miles) is considerably more than from Wilmington, California, near Long Beach (approx. 425 miles). Rand McNally Road Atlas (Rand McNally Co. 1971).

19. See footnote 16, above.

20. Witness Thomas' first hand knowledge of the details of Ford's sales was never demonstrated. He had only infrequent contact with the day to day business of Ford (T. 356-57), and he did not purport to be testifying from Ford's records of sales—none of which were ever introduced.

sales were made at an unspecified time in unspecified amount to one contractor located in Medford, Oregon. (Petition, p. 15.) As to the supposed Oregon contractor, there was no testimony where the goods sold were delivered —to a job site in California or to Oregon. (T. 434-35.) Witness Ornellas, Ford's Sales Manager during the entire relevant period, had no recollection of any shipment to a contractor located out-of-state (T. 277). Ford stipulated as an "undisputed fact" in the final pretrial order (R. 433):

> "Plaintiff . . . was organized for and has been engaged in the business of the marketing, selling and distribution of roofing products which it has sold throughout Santa Clara, Alameda, San Francisco, Contra Costa, Monterey and San Mateo Counties."

Moreover, Ford's October 1, 1963-September 30, 1964, State Income Tax Return (Exh. 30, Items 39 and 40, pp. 1-2; T. 621, 629, 632) shows that Ford had *no* out-of-state income during the period in which the instant controversy arose and the termination occurred.

4. EVIDENCE OF ADDITIONAL PURCHASES FROM OUT-OF-STATE BY FORD

Petitioner thinks so little of the evidence of purchases of unrelated products by Ford from out-of-state (T. 431-34) that it barely mentions it in its petition. (Petition, p. 15.) These purchases by Ford of "other building material" or "other supplies and items" to be sold to Ford's customers may very well demonstrate its involvement with goods in the flow of interstate commerce, but these "goods" have nothing to do with the acts complained of, with PABCO roofing products or Fibreboard, itself, in any respect whatsoever. Ford's insistence on this testimony at trial, and petitioner's reliance on it here, demonstrates, again, the recurrent misconception that Ford could satisfy the re-

quirements of the Sherman Act by demonstrating merely that Ford, itself, in any respect, was engaged in interstate commerce.[21]

Thus, it can be appreciated that under either the "clearly erroneous" standard of review of the trial court's evaluation of this evidence, or the "most favorable to plaintiff" standard, Ford's showing of interstate commerce involvement was wholly deficient and incapable of supporting the essential interstate commerce nexus upon which a Sherman Act verdict must rest. The trial court concluded that the evidence was "wholly insufficient" (344 F. Supp. at 1329) and "as thin as we have ever seen on an interstate commerce issue". (*Id.*, p. 1327.) Fibreboard maintains that the trial court was manifestly correct in its appraisal of the weight and sufficiency of the evidence on interstate commerce involvement and applied the correct and prevailing legal criteria to that evidence.

SUMMARY OF ARGUMENT

Ford failed to carry its burden of proof in this case by introducing sufficient evidence to support a finding of the requisite involvement of interstate commerce. The trial court so found and the Court of Appeals affirmed, denying a petition to reconsider upon an application for rehearing *en banc*. Petitioner now attempts to salvage the case by misstating the evidence in an attempt to create the illusion that there is a legal issue present that meets this Court's criteria for review. Petitioner's attempts are transparent and unavailing.

The decisions of the lower courts do not present a conflict with the applicable decisions of this Court on the question of interstate commerce involvement under Section

21. See footnote 16, above.

1 of the Sherman Act. On the contrary, both the trial court and the Court of Appeals followed precisely this Court's requirement that the facts presented are to be analyzed to determine if there is the requisite interstate involvement.

The trial court found that the acts complained of by Ford were not in the flow of commerce. The roofing insulation was neither a PABCO product, nor was it covered by the termination notice. Likewise, there was insufficient evidence to support any finding as to any PABCO products (or otherwise) that Ford's termination had any effect on interstate commerce.

The decisions below do not conflict with *decisions* of other circuits. The only conflict is that the facts in this case do not support a finding of interstate involvement, while the facts in some cases in other circuits, as well as the Ninth Circuit, do support such a finding and some do not.

Petitioner's last desperate rescue attempt is equally without merit. The issue of interstate commerce is the underlying basis for every Sherman Act case, and the actions of Ford's counsel fully demonstrated awareness of this elementary point and the obligation to introduce jurisdictional facts to establish involvement in interstate commerce.

ARGUMENT

At the outset, petitioner has misstated the evidence as found by the trier of fact (Petition, p. 16; compare 344 F. Supp. at 1327-28), and has recited as conclusive what the trier of fact found could not be supported by evidence. (*Id.*) From this point the petitioner invites this Honorable Court's review of the application of *petitioner's* version of the facts to the law. Petitioner seeks nothing less than a new trial by the Supreme Court of the United States.

The trial court, as finder of fact, did *not* find that shipments were made from Oregon to California during periods

of shortages when competition between Ford and its competitors was most intense, and the trial court did *not* find any instance of roofing materials having been sold to Ford and then delivered to Oregon from California. To the contrary, it found that there was insufficient evidence to warrant *any* finding, and it found the evidence respecting roofing insulation sales insufficiently related to Fibreboard's termination of Ford's PABCO distributorship to be material to the issue of involvement in interstate commerce *of the acts complained of.*

For these reasons most of petitioner's argument (Petition, pp. 17-40) is purely a treatise on the subject without relation to the case, as presented, in the factual context set and determined by the trial court and affirmed by the Court of Appeals. Nevertheless, we will respond to the arguments made, pointing out where those arguments mislead because they were based upon erroneous assumptions with respect to the evidence and facts as found and determined by the trial court.

I. There Is No Conflict Presented With Decisions of This Court Respecting the Prerequisite Involvement With Interstate Commerce Under Section 1 of the Sherman Act.

Petitioner argues that the decisions of the lower courts conflict with the pronouncements of this Court respecting the reach of interstate commerce in Section 1, Sherman Act cases. To illustrate its point, however, petitioner relies upon analysis presented in cases *not* decided under the Sherman Act.[22] But the analysis is not appropriately the same.

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22. Perez v. United States, 402 U.S. 146 (1971); Maryland v. Wirtz, 392 U.S. 183 (1968); Wickard v. Filburn, 317 U.S. 111 (1942); Cleveland v. United States, 329 U.S. 14 (1946); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

Even though Congress exercised its full power under the commerce clause in enacting the Sherman Act, as this Court stated over twenty years ago, "Congress . . . left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce [under] the Sherman Act", whereas, in other legislation "Congress itself has said that a particular activity affects commerce . . . [where] the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power". *United States v. Darby*, 312 U.S. 100, 120-121 (1941). It is entirely clear from the cases relied upon by petitioner that the legislation there involved was of the type last-mentioned above in the quote from *United States v. Darby*. This is borne out by those cases.

In *Katzenbach v. McClung, supra* at 302-303, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Wickard v. Filburn*, 317 U.S. 111 (1942), the very distinction made in *United States v. Darby*, above quoted, is set out and relied upon for the proposition that the statute involved was of the second class, *unlike the Sherman Act*, where Congress determined for itself that a particular class of activity burdens the flow of interstate commerce and made no provision for a case-by-case factual determination. The same is true of *Perez v. United States*, 402 U.S. at 152-154, wherein the *Heart of Atlanta Motel* and *Katzenbach v. McClung* cases are discussed in the same vein, along with *Maryland v. Wirtz, infra*. An examination of the *Wirtz*[23] case reveals

23. In *Wirtz* the Court dealt with the same statute, the Fair Labor Standards Act, which was the subject of United States v. Darby, *supra*, and stated, regarding the case before it and Wickard v. Filburn, "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." (392 U.S. at 197, n. 2.)

the same distinction from the Sherman Act is present with respect to the statute there involved. See also *In re Western Liquid Asphalt Cases*, 487 F.2d 202, 205 (9th Cir. 1973). The *Cleveland* case involved no issue of whether interstate commerce had been employed in the acts complained of.[24]

The "class-of-activity" approach obviates any judicial examination of commerce involvement on a case-by-case basis. That has *never* been the law under the Sherman Act, as confirmed by *United States v. Darby*, *Katzenbach v. McClung*, and *Perez v. United States*, *supra*, and as demonstrated by this Court's analysis in *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-233 (1947). There the factual showing made led this Court to the conclusion that the local taxicab service affected by the conduct complained of was "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act". (*Id.* at 230.) In the *Yellow Cab Co.* case, however, this Court made a specific point of reserving from its conclusion any intimation that it meant "to establish any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act" or that "all conspiracies among local cab drivers are so unrelated to interstate commerce as to fall outside the federal law". Rather, this Court stated further that under other factual circumstances such a conspiracy as complained of in the case before it "might have sufficient effect upon interstate

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24. In *Cleveland* the issues were whether the Mann Act's prohibition against transporting a woman in interstate commerce for "any . . . immoral purpose" included such transit for the purpose of polygamous marriage and whether the requisite "immoral purpose" was, in fact, present in that case. (329 U.S. at 18, 19.)

commerce to justify imposition of the Sherman Act. . . ." (*Id.* at 232-233.)[25]

There is, therefore, no "class of activity" defined in the *Sherman Act, Section 1* as to which the courts "have no power to excise, as trivial, individual instances" (*Maryland v. Wirtz*, 392 U.S. 183, 193 (1968); *Perez v. United States*, 402 U.S. 146, 154 (1971)). It is, in each instance, for the court to determine *from the evidence presented* whether a particular incident is or is not sufficiently "in the flow" of, or has a substantial enough effect upon, interstate commerce to bring it within the compass of Section 1 of the Sherman Act. Petitioner's "class of activity" approach would obviate *any* consideration of the interstate commerce criterion of the Sherman Act, Section 1.[26]

That the determination of interstate commerce involvement is a highly factual matter, subject to proof in each case involving Section 1 of the Sherman Act, is demonstrated further by the extensive analysis of *Manderville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), one of the cases petitioner seeks to enlist in support of its "class of activity" theory. (Petition, pp. 17, 19, 22.) In *Manderville Island Farms, Inc.*, and its reference to dicta in *United States v. Frankfort Distilleries*, this Court stated:

> "[T]he inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total

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25. To like effect is Yellow Cab Co. of Nevada v. Cab Employees Local No. 881, 457 F.2d 1032 (9th Cir. 1972), upon which the trial court in the instant case relied (344 F. Supp. at 1326, n. 1, 1328-29).

26. The "class of activity" petitioner advocates as applicable here under the Sherman Act is never clearly delineated, but appears to be *per se* illegal concerted refusals to deal (Petition, pp. 34-35). Such a class *could not* be applied here in the light of the trial court's determination, *as a matter of law*, that there is insufficient evidence to support any finding of *per se* illegal restraint in this case. (344 F. Supp. at 1326, n. 1.)

economic process is now merely a preliminary step, *except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.*[14]

• • •

14. In *United States v. Frankfort Distilleries*, 324 U.S. 293, 297, we said, 'It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Antitrust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce'. [Case citations omitted.]" (334 U.S. at 234—emphasis added, footnote the Court's.)

The Court's *per curiam* decision in *Burke v. Ford*, 389 U.S. 320 (1967), also relied upon by petitioner (Petition, pp. 19, 21, 22) follows the same analysis as, and cites, *Manderville Island Farms, Inc., supra*, in stating, "it is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce". (389 U.S. at 321.)

The trial court herein, and the Court of Appeals, followed this precise formula for analysis of the factual presentation made by Ford. This two-pronged analysis was specifically articulated twenty years ago in *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F.2d 732, 739-740, n. 3 (9th Cir. 1954), cert. denied, 348 U.S. 817:

> "(1) That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.
>
> (2) That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but substantially affected interstate commerce.
>
> Under both of these theories, the transactions complained of must affect or have an effect on interstate

commerce or the requirements of the statute are not satisfied."

The trial court (344 F. Supp. at 1325-26) endorsed by the Court of Appeals (493 F.2d at 1205) here recognized these criteria as controlling.

These criteria represent the full exercise of Congress' power over interstate commerce. (210 F.2d at 739-40.)[27] That power reaches beyond the actual flow of interstate commerce to all activities occurring before or after (or outside) the flow which have a substantial effect on the flow of commerce—thus the "affect commerce" test as stated by this Court in *Burke v. Ford*, *supra* at 321. This latter test requires an evidentiary demonstration of a quantitatively significant impact upon interstate commerce in order for the requisite involvement with interstate commerce to be present.[28] The trial court found, as the trier of fact, that Ford had made no demonstration of any significant impact on commerce (344 F. Supp. at 1325). In fact, Ford contended before the trial court that the "substantial effect on commerce" theory was inapplicable, and petitioner does not argue here that the evidence demonstrated any substantial impact on interstate commerce. Instead, petitioner relies solely on its contention that no demonstration of impact on commerce was necessary because the "in commerce" theory applies, regardless of the

27. Citing United States v. Frankfort Distilleries, 324 U.S. 293, 298 (1945); United States v. Southeastern Underwriters Ass'n., 322 U.S. 533, 558 (1944); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948); and United States v. Chrysler Corp., etc., 180 F.2d 557, 560 (9th Cir. 1950).

28. *Id.* See also Las Vegas Merchant Plumbers Ass'n. v. United States, *supra* at 210 F.2d at 747, 748.

29. See note 15, supra.

insufficiency of Ford's evidentiary demonstration.[30] In any event, the "substantial effect on commerce" theory was intentionally waived before the trial court, and not argued to the Court of Appeals, and may not now be resurrected as the subject for invocation of this Court's jurisdiction on certiorari. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *Helvering v. Wood*, 309 U.S. 344, 348-49 (1940); *Virtue v. Creamery Package Co.*, 227 U.S. 8, 38 (1913).

II. The Evidence Showed No Involvement in the Flow of Goods in Interstate Commerce.

Petitioner details in its petition (at pp. 22 through 35) the task it asks this Court to undertake—a revaluation of the evidence and determination of the findings of fact pertinent to the interstate commerce issue. Realizing well that this is not a function the Court normally undertakes within its discretionary jurisdiction, especially where, as here, two lower courts have appraised and agreed upon the significance of the evidence in this regard, nevertheless Fibreboard responds to the rearguments of the evidence (rather than Reasons for Granting a Writ, as billed—Petition, p. 16) offered in the petition.

At the outset (Petition, p. 22) petitioner states, erroneously, that its version of the facts—set forth in its Statement of Facts—is undisputed. This is not true, as we have

30. Only by enlisting, under its "class of activity" approach, the entire substance of every past, present and future, though entirely unrelated, instance of a *per se* illegal concerted refusal to deal (even though the trial court found, as a matter of law, no sufficient basis in the evidence for application of the *per se* illegal doctrine in this case—344 F. Supp. at 1326, n. 1), could petitioner muster enough arguable *theoretical* impact on interstate commerce to maintain a substantial effect on commerce may be felt. There is, of course, no evidence of such *theoretical* impact in the record of this case to support even that argument.

detailed above (pp. 8-20).[31] More important, however, is that its version of the two elements it relies on to demonstrate an involvement of the acts complained of in the "flow of interstate commerce" is contrary to what was found by the trier of fact—the trial court—and affirmed by the Court of Appeals. There was *no* finding of movement of roofing materials from Fibreboard's Portland, Oregon plant to Ford; rather the trial court noted the evidence fell short of demonstrating *any* flow of such materials to Ford, or of even a single instance of Ford's ordering or receiving such materials. Moreover, the trial court noted that the "roofing materials" were never shown to have been of the sort covered by the Ford wholesale distributorship arrangement, the termination of which was the act complained of in this lawsuit. (344 F. Supp. at 1327.) Therefore, even if the trial court had had before it evidence of movement of "roofing materials" from Oregon to Ford, and had made a finding thereon, which it could not and did not, there was no basis for relating that movement to the termination of Ford's wholesale distributorship arrangement for PABCO Asphalt Roofing Products.

The "roofing materials" from U.S. Gypsum and Kaiser in Oregon and Washington were roofing insulation mate-

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31. For example, the so-called undisputed evidence of roofing materials moving from Fibreboard's Portland, Oregon, plant to Ford was disputed by Ford's own president, who, in answer to the trial court's question, "As far as the Fibreboard product, that you bought from Fibreboard. That was PABCO. As I understand they were manufactured in California", gave the only evidence on the source of PABCO materials actually purchased by Ford—"Yes, sir. They were". (T. 434, see p. 15, above.) Also, the so-called undisputed oral evidence of Ford's resale of Fibreboard roofing products to a customer in Oregon was disputed by the testimony of Ford's own sales manager, who could recall no such instance during his entire tenure, which was coextensive with the corporate life of Ford (T. 277), and by the "undisputed facts" stipulated to in the pretrial order. (R. 433, see pp. 18-19, above.)

rial—specifically so identified in the testimony (see pp. 12-13, above) and so found by the trial court (344 F. Supp. at 1329), as to which Fibreboard acted only as a middleman seller. They were *not* covered by the wholesale distributorship arrangement between Ford and Fibreboard, the termination of which was the act complained of in this case, and there was no claim or evidence that Fibreboard ever refused to sell such insulation materials to Ford—the subject of the refusal and termination herein being solely PABCO Asphalt Roofing Products.

The trial court found that after Ford's termination as one of Fibreboard's wholesale distributors of PABCO products "Ford continued to obtain this insulation material—either from its manufacturer or from other dealers—in the same manner as before the termination". (*Id.*) The trial court also found in this regard that the insulation material "was not a PABCO product and there is no evidence that it was among the kinds of products listed in the Fibreboard distribution policy statement (Ex[h]. 2) [T. 102, 104] *or covered by the termination notice*". (*Id.*—emphasis added.) Petitioner characterizes these findings of the trial court as establishing that "Ford was *not able* to purchase these interstate materials from Fibreboard" and Ford *found it necessary* to obtain this material from the manufacturer or from other dealers". (Petition, p. 24—emphasis added.) There is no evidence, and the trial court's findings are to the contrary, that Fibreboard *ever* refused to sell roofing *insulation* material to Ford. The point of the trial court's finding is that Ford's ability to get roofing insulation material was not affected *at all* by the termination of Ford's wholesale distributorship for PABCO products.

Therefore, petitioner's whole argument (Petition, pp. 25-31) stemming from its premise, *not* established in this

case as a factual matter, that "defendants' [sic] termination of plaintiff operated directly on goods which, prior to the termination, 'flowed' from defendant Fibreboard to plaintiff" (*Id.*, p. 25) is not supported in the evidence or facts as found in this case.

This Court has often stated it will not engage in advisory opinions on questions of law, important or otherwise, not grounded in an actual case or controversy. *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 284 (1969); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been [the Court's] considered practice not to . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied.") The instant petition seeks to induce such an exercise by a distortion of the record evidence and the facts as found by the trier of fact.[32]

Concomitantly, it is apparent the trial court and the Court of Appeals properly applied correct principles of law to the facts, as found, for determination of whether the acts complained of were "in the flow" of commerce. See *Gough v. Rossmoor Corporation*, 487 F. 2d 373 (9th Cir. 1973) and *Yellow Cab Co. of Nevada v. Cab Employees Local No. 881*, 457 F. 2d 1032 (9th Cir. 1972), the princi-

32. Footnotes 3 and 4 of the petition (pp. 24, 28) demonstrate petitioner's distortion of even the *function* performed by the trial court, as trier of fact on the interstate commerce issue (recently specifically approved as a proper role for the court in Gough v. Rossmoor Corporation, 487 F.2d 373, 377 (9th Cir. 1973) and Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416 (5th Cir. 1972)). The trial court weighed the evidence and found it insufficient to support any reasonable finding of involvement in interstate commerce. On review that process may be reversed *only* if "clearly erroneous".

ples and analysis of which the Court of Appeals and trial court applied and followed in this case.

There is no conflict with *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923), wherein this Court found sufficient allegation of the requisite involvement in interstate commerce in the complaint by reason of averments that:

> 1) A conspiratorial refusal to deal existed among film distributors, located in different states; the act complained of involved film contracts interstate in nature as to parties participant and the business transacted thereunder (263 U.S. at 309); and
>
> 2) The act complained of put an end to the plaintiff's participation in that business affecting the movement of films in interstate commerce to plaintiffs and, thereby, operating in the channels of interstate commerce. (*Id.* at 311-312.)

Each of these factual allegations was, of course, accepted as true for purposes of testing the sufficiency of the averments of the complaint—the only issue before the Court. Here, by way of contrast, Ford *failed to prove* any operation of the act complained of in, or substantially affecting, interstate commerce, under principles of law consistent with the *Binderup* case's analysis. Again, petitioner takes liberties with the evidence and the facts as found in stating (Petition, p. 30) that Ford's termination as a PABCO distributor "prevented it from purchasing from Fibreboard . . . products made in Washington and Oregon." There was no prevention as to the products shown to have originated out-of-state, and there was no out-of-state origin shown as to the PABCO products with which Ford's termination was solely concerned.

Similar to *Binderup*, in the *Klor's, Inc.* and *Radiant Burners, Inc.* cases, relied upon by petitioner (Petition, p.

30), the scheme or concerted conduct complained of operated, unquestionably, directly in the channels of interstate commerce.[33] In neither case was there presented any issue respecting involvement in interstate commerce—the issue in both being whether sufficient *public injury* was involved to constitute an actionable wrong under the Sherman Act.

The fact that only Ford, a single dealer, was involved in the acts complained of is *not* the basis upon which either court below reached its decision. The basis was that the acts, themselves, were not operative in interstate commerce or directed at interstate commerce, and Ford, itself, in the aspects of its business germane to the acts complained of, was not engaged in interstate commerce.

No issue of involvement in interstate commerce was presented in *United States v. McKesson & Robbins*, 351 U.S. 305 (1956), where the defendant's price maintenance scheme operated through 74 wholesale divisions in 35 states. (*Id.* at 306), or in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), where the price-fixing scheme pervaded at least five states and involved defendants operating in ten different states. (*Id.* at 166).

In *United States v. Women's Sportswear Mfg. Assn.*, 336 U.S. 460 (1949), quoted from on pages 28 and 29 of the petition, this Court determined interstate commerce involvement on the "substantial effect on interstate commerce" as distinct from the "in the flow of interstate commerce" analysis relied upon below by Ford.[34] This Court there

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33. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) and Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 656 (1961). In *Klor's*, another pleading case, essentially, ten nationwide appliance concerns allegedly conspired with a department store to withhold their products from a discounter. *Radiant Burners*, also a pleading case, follows *Klor's* and alleged a multi-state conspiracy to prevent interstate sales of the plaintiff.

34. See note 15, above.

noted (336 U.S. at 464), "The business affected by the restraint is interstate commerce. The volume affected is substantial." In contrast, the trial court here found (344 F. Supp. at 1325):

> "Plaintiff, however, makes no . . . contention in this case nor is there any evidence that these intrastate transactions [sales of PABCO Asphalt Roofing Products to Ford which were manufactured at Fibreboard's Martinez, California, plant] actually affected interstate commerce substantially *or otherwise*." [Emphasis added.]

III. The Evidence of Out-of-State Shipments Was Insufficient.

The trial court found the evidence not only insubstantial as to impact of interstate commerce, but it found the evidence offered on involvement of the acts complained of "in the flow of interstate commerce" was

> "as thin as we have ever seen on an interstate commerce issue [and], falls far short of supporting a finding that defendants' termination of the otherwise intrastate transactions and relationship of the parties occurred 'within the flow' of interstate commerce." (344 F. Supp. at 1328.)

It further found, upon the entire record:

> "there is no substantial evidence that the termination significantly interrupted Ford's ability to obtain roofing material *except* the Pabco Asphalt Roofing Products manufactured at Martinez which it had been theretofore regularly receiving in an *intrastate* relationship under the terms of its Pabco distributorship arrangement.
>
> "There is no substantial evidence of any significant interference with any roofing materials which could be fairly said to have been 'in the flow' of interstate commerce. [Footnote omitted.]" (*Id.*)

Only as an alternative to the foregoing did the trial court *assume* a *per se* violation in the case[35] and that some out-of-state materials did remain "within the flow of interstate commerce" in some sense germane to this case,[36] and, even then, it concluded that the quantum of *evidence* was so meagre as to be legally insufficient to support any finding other than that the acts complained of were directed at intrastate rather than interstate activity (*Id.* at 1328-1329.)

Petitioner, undaunted by the thoroughness of the trial court's explication of the deficiencies of the evidence, states, erroneously and contrary to the trial court's decision, that a *per se* violation "has already been established herein." (Petition, p. 31.) Then, assuming the further premise, also contrary to the trial court's findings, that some involvement of goods in the flow of interstate commerce has been demonstrated herein, petitioner urges reversal because the quantity of goods involved is immaterial. (*Id.*) The trial court *agreed* with that as a conclusion of law on the factual premises assumed by petitioner. (344 F. Supp. at 1326-27.) It is the petitioner's assumptions of facts contrary to the findings which presents an *apparent* issue of law.

There follows (Petition, pp. 31-32) a recital of further "facts" respecting the nature and timing of out-of-state shipments and competitive conditions in Ford's market for resale, without benefit of any support in or reference to the record. From these new premises, contrary to the findings the record and even common sense,[37] petitioner conjures a

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35. Which the trial court, in fact, *found*, as a matter of law, *not* to be supportable by the evidence. (344 F. Supp. at 1326, n. 1.)

36. Also contrary to what the trial court *found* to be the case, as quoted next above.

37. Petitioner states that in a period of shortage of PABCO roofing materials "competition between Ford and other distributors grew so intense," and that it follows that Ford's termination

"competitively important interstate supply of materials," relying upon an out-of-context quote from *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1963)—another case in which there was no issue as to involvement in interstate commerce. Where quoted, the Court in *Simpson* was addressing the same question respecting the elements of *an actionable wrong* under Section 1 of the Sherman Act as was presented in *Klor's, Inc., supra,* and *Radiant Burners, Inc., supra* (both of which the *Simpson* opinion cites)—significance of the public injury involved. This is a different concern than whether the acts causing that injury occurred in or had sufficient relationship to interstate commerce so as to invoke the coverage of Section 1 of the Sherman Act. See *Gough v. Rossmoor Corporation, supra* (referred to as *Rosen v. Rossmoor Corporation*), quoted at length and followed in the Court of Appeals' opinion in this case (493 F. 2d at 1205).

Burke v. Ford, 389 U.S. 320 (1967), a case determined under the "substantial effect on interstate commerce" test, is inapposite here in support of petitioner's claim that the evidence was sufficient to find involvement in interstate commerce under the "in flow" test. In any event, the "substantial volume" in *Burke* was $45,000,000 in annual purchases on a state-wide basis of liquor *entirely* originating from out-of-state. (*Id.* at 321, n. 1). Here, by way of con-

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"bore directly on the vigor of competition in the relevant Northern California market." (*Id.* at 32.) Further detail of this logic is set out at page 33— one less customer (Ford); less demand for PABCO; less shortage of PABCO; less need for shipments from Oregon; equals a reduction in "interstate sales and delivery" of PABCO. Both assume a condition of recurring shortages, contrary to the only testimony on the subject that a *temporary* condition of shortage was cured (T. 80, 92). It is also difficult to see any inherent logic in either of these lines of reasoning without some factual basis as to the amount, frequency, composition and timing of these out-of-state shipments—as to which Ford, with the burden of proof, made no showing.

trast, there is no evidence of the volume of goods from out-of-state even conceivably involved in and affected by Ford's termination by Fibreboard. The *Burke* case is like the *Gough* (or *Rosen*) case, *supra,* distinguished on its facts by the Court of Appeals' opinion in this case, wherein "carpeting coming into California from other states could not meet their destined use . . .". (493 F. 2d at 1206.) Here there is no evidence of any material from out-of-state that was or could have been affected by Ford's termination as a distributor of PABCO Asphalt Roofing.

Petitioner seeks to negate *any* "de minimis" limit to the showing required of goods moving in the flow of interstate commerce by calling the showing it says it has made "competitively significant", on the basis of the purest surmise, unaided by any evidence (let alone findings of fact), and by reenlisting its "class of activities" approach from non-Sherman Act cases arising under totally different legislative mandates (see pp. 22-25, above). The trial court did *not* rest its decision on the "de minimis" *amount* of *demonstrated* interstate movement of goods pertinent to the acts complained of. Rather it found *no* sufficient evidence of *any* pertinent movement. (344 F. Supp. at 1328.) Only, alternatively, did the trial court, on "assumptions" contrary to its own findings, reach the conclusion that some "miniscule" interstate movement of out-of-state goods to Ford might be found. From this the trial court deduced that the acts complained of *could not* have been directed to Ford's interstate, but *must have been* directed to its intrastate, business, following analysis set down by *Yellow Cab Co. of Nev. v. Cab Employees Local No. 881,* 457 F. 2d 1032 (9th Cir. 1972). Consistent with the analysis of this Court in *United States v. Yellow Cab Co.,* 332 U.S. 218, 225, 231 (1947), and that in *United States v. The Bensinger Co.,* 430 F. 2d 584 (8th Cir.

1970), the court of appeals in the *Cab Employees* case, and the trial court here, recognized that if it is otherwise clear that a *per se* illegal conspiracy is directed at interstate commerce[39] the amount of goods involved is unimportant. However, in both the instant case and the *Cab Employees* case, it was *not* otherwise clear. In that event, the trial court here, like the court of appeals in the *Cab Employees* case, determined that even the *professed* interstate movement of out-of-state roofing materials to Fibreboard in the San Francisco Bay Area was *de minimis to* the *intrastate* busi-

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39. In the *Bensinger* case the price-fixing conspiracy, a *per se* violation, was directed to a single dishwashing machine that moved in interstate commerce pursuant to the order of its out-of-state agent, which *movement* was *directly* threatened by the operation of the conspiracy. The scheme was *per se* illegal and it was specifically directed at goods moving in interstate commerce. The same was true of the restraint of cab purchases in the *Yellow Cab Co.* case (332 U.S. at 225), but as to the alleged restraint of intracity cab operations in that case, this Court held that the commerce against which the alleged conspiracy was directed was "too unrelated" and had only "casual and incidental" relationship to interstate commerce. (332 U.S. at 230, 231.) It may be noted that the Court in the *Bensinger* case emphasized that "Were the price-fixing agreement to have occurred in intrastate commerce, it would be necessary to show a substantial impact on interstate commerce." (430 F.2d at 589, n. 3.) Here Ford failed to show any operation of the acts complained in interstate commerce and did not even profess any showing of any "substantial impact" on interstate commerce—failing to adduce adequate evidence to support either theory.

This case is, therefore, remarkably like Uniform Oil Co. v. Phillips' Petroleum Co., 400 F.2d 267 (9th Cir. 1968), wherein the court of appeals affirmed a directed verdict because the plaintiff "failed to offer adequate proof that the activity in question was in interstate commerce or had a substantial effect upon interstate commerce." (*Id.* at 269.) There, as here, the alleged illegal activities occurred in a wholly local, intrastate environment, and, therefore, plaintiff had to, but failed to offer "the required proof that the effect [on interstate commerce] was 'not insubstantial.'" (*Id.* at 270.) Recounting evidence no leaner than that in this case, the court noted the "manifest insufficiency of evidence upon the record," and held "the absence of such indispensable proof deprived the District Court of jurisdiction over the Sherman Act claims." (*Id.*)

ness affected—confirming its conclusion that the acts complained of not only occurred in but were directed at the intrastate business. (344 F. Supp. at 1329.) The trial court then added that, even on the assumptions made, contrary to its own findings, respecting a *per se* violation and the movement of out-of-state roofing materials to Fibreboard in the San Francisco Bay Area:

> "All that really appears in this case is [Ford's] claim that it has been somehow precluded from purchasing some items of unspecified nature and unspecified amount (and, therefore, presumably a minimal amount) occasionally brought from Portland to Martinez [California] but—so far as the evidence shows—never even purchased by Ford.
>
> "It would be straining, indeed, to hold that a bare possibility that Ford might at some time acquire one or more of such items would transform an otherwise purely intrastate relationship into an interrupted "flow" of interstate commerce."

In this context, and for the purposes employed in the trial court's reasoning process, the *de minimis* treatment of Ford's professed foreclosure from roofing materials originating out-of-state was equivalent to this Court's finding of only "casual" or "incidental" relationship between interstate commerce and the intrastate commerce affected in *United States v. Yellow Cab Co., supra*, 332 U.S. at 231, and was, therefore, fully consistent with the precedents of this Court. See also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969), which specifically recognizes the propriety of a "de minimis" cut-off level, but held that calculation of the amount of commerce restrained should look to the entire area where the conduct operates. Here that would be coextensive with only this

particular plaintiff and defendant. In *Fortner* it was broader.

IV. There Is No Conflict Among Circuits Introduced by the Decisions Below.

Perhaps the leading court of appeals decisions in the nation on the subject at hand are *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F. 2d 732 (9th Cir. 1954), cert. denied, 348 U.S. 817, and *Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), cert. denied, 368 U.S. 875,[40] both of which cases the trial court and Court of Appeals followed in the instant case. The *Page* case has been recently approved in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F. 2d 416, 418 (5th Cir. 1972), which was decided six months after *Lehrman v. Gulf Oil Corp.*, 464 F. 2d 26 (5th Cir. 1972), cert. denied, 409 U.S. 1077, that petitioner represents is in conflict with the *Page* case and the instant case. (Petition, pp. 36-39.)[41] It should

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40. Beyond the numerous decisions of the Ninth Circuit which approve and follow the principles announced in these decisions are the following decisions in other circuits: Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F. 2d 48, 50, 54 (3d Cir. 1973); Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F. 2d 416, 418 (5th Cir. 1972); United States v. The Bensinger Co., 430 F. 2d 584, 588, 590-91 (8th Cir. 1970); Lieberthal v. North Country Lanes, Inc., 332 F. 2d 269, 271, 272 (2d Cir. 1964); Cook v. Ralston Purina Company, 366 F. Supp. 999, 1009, 1010 (M.D. Ga. 1973).

41. Cook v. Ralston Purina Co., 366 F. Supp. 999 (M.D. Ga. 1973), which petitioner also argues conflicts with *Page*, arises in the same Fifth Circuit, follows and applies the principles enunciated in Las Vegas Merchant Plumbers Ass'n. v. United States, supra (see Note 40, above), as did the lower courts here, and involved a factual situation entirely different from this case. Like in Rasmussen v. American Dairy Ass'n., 472 F. 2d 517 (9th Cir. 1973), the *Cook* court found that *all* the ingredients for the restrained product marketed intrastate came with a continuity of flow from out-of-state through the massive interstate operations of defendant Ralston Purina Company (366 F. Supp. at 1009-1010.) Citing neither the *Lehrman* nor *Rosemound* cases on this issue

be noted also that, so far as we can find, neither the *Lehrman* case nor the *Rosemound* case has been subsequently cited for their discussions of the principles applicable to the determination of involvement with interstate commerce under the Sherman Act, either within or without the Fifth Circuit.

In any event, the instant case did not present either factual aspect considered determinative by the court of appeals in its "in commerce" and "effect on commerce" findings, respectively, in *Lehrman*. Abrupt withdrawal of the "TCA" price-support system for Gulftane gasoline, giving rise to the demise of Lehrman's business and the suit against Gulf, was found to be a "credible threat" to *all* Gulftane dealers of the consequence that would flow from failure to observe Gulf's suggested resale prices or competitive differentials. The TCA system was in effect through the entire country and the "threat" of its withdrawal as a coercive practice, injected by the *Lehrman* instance, had "untold geographical potential." (464 F. 2d at 32-33.) In other words, the court found that the conduct complained of by *Lehrman*, retaliative withdrawal of competitive pricing support, was *directed at* interstate commerce activity and became *operative in* the entire TCA system as a pending "threat." The impact was felt on all interstate commerce involved wherever the widespread TCA system operated. No similar widespread practice or system is here involved. The entire theory of the case as presented below is inconsistent with Fibreboard's refusal to sell to Ford in Oakland and eventual termination of Ford's distributorship having been motivated by a "coer-

(while, however, distinguishing *Lehrman* on another point—366 F. Supp. at 1013), and following *Las Vegas Merchant Plumbers Ass'n.*, the trial judge concluded there was a sufficient factual showing under the "in flow" theory.

cive threat" directed at *other* dealers in either the same or remote market areas.

Under the "affect commerce" theory the *Lehrman* court found, as a secondary ground for jurisdiction, that the demise of Lehrman's business caused related tires, batteries and accessories purchases from out-of-state to abruptly cease. The court considered Lehrman's *individual* purchases as significant over the long term and their loss as "significant" when his business was *ended* as the result of Gulf's conduct. It was on this very basis, the termination of out-of-state supplies (demonstrated in the evidence), that the *Lehrman* case distinguishes *Page v. Work, supra.* (464 F. 2d 35-36.)

Here all of the evidence from Ford's *own* witnesses indicates that the flow of "related" non-PABCO roofing insulation *continued,* as did Ford's *entire* business. Its sales of, among other things, non-PABCO roofing insulation purchased from out-of-state *increased.* There is *no* evidence here that Ford *ever* bought any of the PABCO products involved in the acts complained of from out-of-state, and, no evidence that the occurence or frequency of transfers of out-of-state products, if any, to the Martinez plant inventory were affected *at all* by cessation of sales to Ford under the wholesale distribution arrangement.

Thus, the *Lehrman* case would not indicate a result different from that reached by the trial court and the Court of Appeals in this case.[42]

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42. Petitioner states that the opinion in this case departs from "the prevailing view of liberally construing the interstate commerce requirement under the Sherman Act" evidenced by, among others, the case of Rosen (or Gough) v. Rossmoor Corporation, *supra* (Petition, p. 36, n. 5). This is indeed, curious in the light of the Court of Appeals' opinion herein, which quotes at length the principles articulated in that case and specifically affirms their consistency with the result reached here. (493 F. 2d at 1205.)

Having failed at trial to establish a basis for interstate commerce involvement, petitioner purports to *find* "here as in *Lehrman*" (Petition, p. 38) certain "uncontradicted evidence" that Fibreboard's interstate activities declined as a result of Ford's termination. The four elements of this evidence, as recited by petitioner, *do not exist*, either in the record or in fact,[43] and no citations to the record are offered for location of this non-existent evidence. This very lack of evidence, not cured by the mere conclusory, inaccurate statement that evidence exists, is the very basis for the lower court's action in setting aside the verdict and entering judgment for Fibreboard. Nothing petitioner has argued has corrected this deficiency in the slightest.

Finally, petitioner's contention that there is conflict with *United States v. The Bensinger Co., supra*, in the decisions of the courts below is untenable. As noted already,[44] the *Bensinger* case approves and follows the principles laid down by the *Las Vegas Merchant Plumbers Ass'n.* case, *supra*, which were, in turn, applied as the controlling principles by the trial court. (344 F. Supp. at 1326.) Moreover, the trial court followed the principles articulated in *Yellow Cab Co. of Nevada v. Cab Employees Local No. 881*, 457 F. 2d 1032 (9th Cir. 1972), which, in turn, discusses at length, approves and distinguishes on its facts the *Bensinger* case. In *Bensinger*, the *facts* demonstrated the oper-

43. There is *no* evidence *whatsoever* that Fibreboard sales to San Francisco Bay Area distributors included a "secondary source of supply . . . from Oregon," or what, if any, amount of roofing insulation Fibreboard purchased from out-of-state, before or after Ford's termination. There is also *no* evidence that Ford *ever* supplied any "out-of-state customer" with PABCO products manufactured in California, and no evidence of any occasion for it to do so either before or after termination. Neither does the record contain evidence of Fibreboard's *complete* sales to San Francisco Bay Area distributors before or after termination of Ford.

44. See footnote 40, above.

ation of the *per se* illegal scheme of price-fixing in the flow of interstate commerce (430 F. 2d at 588-589)—here and in the *Cab Employees* case they did not.

There is no conflict, but simply cases in which the facts demonstrate the application of different controlling principles from a common set of principles that are well established and operating with wide acceptance. With a number of cases within the Ninth Circuit, some finding the requisite involvement in interstate commerce[45] and some finding either a lack of evidence to support such a finding or no involvement on the established facts,[46] the Ninth Circuit *unanimously* denied rehearing *en banc* in this case (Petition, App. C), apparently perceiving no conflict in this circumstance. Petitioner has demonstrated here no more than the existence of different results in different cases embodying different facts. Such is not a proper occasion for this Court to exercise its power of review on certiorari.

V. The Issue of Interstate Commerce Involvement Was Properly Before the Trial Court.

Petitioner *also* asks this court to reverse the two lower courts' determinations that the interstate commerce issue

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45. See, e.g. Las Vegas Merchants Plumbing Ass'n. v. United States, supra; Cartrade, Inc. v. Ford Dealers Adv. Ass'n. of So. Cal., 446 F.2d 289 (9th Cir. 1971), cert. denied, 405 U.S. 997 (1972); Rasmussen v. American Dairy Ass'n., 472 F. 2d 517 (9th Cir. 1973); Gough v. Rossmoor Corporation, 487 F. 2d 373 (9th Cir. 1973) and In Re Western Liquid Asphalt Cases, 487 F. 2d 202 (9th Cir. 1973), cert. granted sub nom Gulf Oil Corp. v. Copp Paving Co., Inc., ... U.S. ....., 94 S.Ct. 1586, on issues other than involvement in interstate commerce under the Sherman Act.

46. See, e.g. Page v. Work, supra; Uniform Oil Co. v. Phillips' Petroleum Co., 400 F. 2d 267 (9th Cir. 1968); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F. 2d 341 (9th Cir. 1969); John Kalin Funeral Home, Inc. v. Fultz, 442 F. 2d 1342 (9th Cir. 1971); and Yellow Cab Co. of Nev. v. Cab Employees Local No. 881, supra.

was properly before the court. (Petition, p. 40.) The trial court dealt with this contention by finding "there is nothing in the record to justify plaintiff's contention that any deficiency of evidence to support his [Ford's] interstate commerce allegation is due to plaintiff having been misled concerning the existence of the issue." (344 F. Supp. at 1324-25.) The "existence of the issue" is inherent in *any* case brought under the Sherman Act where the allegations of involvement in interstate commerce are not admitted. It is essential to the district court's jurisdiction under the Sherman Act.

After the trial court's order to cooperate in Ford's counsel's eleventh hour requests for evidence to support commerce involvement, Fibreboard made every effort to comply. (R. 954-55.) Information was obtained, but Ford's counsel never made any effort to *use* any of it. No evidence, other than verbal, *ever* came from Ford on the subject, even though its records were, presumably, more intact than Fibreboard's were three years after sale of its PABCO Division.

From the outset Fibreboard in its answer to Ford's complaint controverted the averments of involvement in interstate commerce. (R. 3, para. 8.—"The products so sold by defendant Fibreboard . . . to plaintiff are manufactured in part in states outside California and shipped into the State of California"; R. 148—"Denies the averments of paragraphs 8 and 9, except admits . . . that it manufactures and sells roofing products outside the State of California.") Nothing thereafter suggests a departure. Before any pretrial order was entered, Ford filed its pretrial statement asserting that all discovery for Ford was completed and that it needed no further trial preparation. (R. 265.) Ford's counsel should have been, and *was*, aware that jurisdictional

facts showing involvement in interstate commerce would have to be proved.

In no sense is the awareness of counsel that he has to prove a basis for *jurisdiction* akin to whether damages can be claimed for future problems in childbirth because of an allegation of pelvic injury. *Walker v. West Coast Freight, Inc.*, 233 F. 2d 939 (9th Cir. 1956). (Petition, p. 40.) The latter case is simply not in point.

That it knew the issue had *not* been proved was evident from Ford's withdrawal of the issue from the jury (344 F. Supp. at 1325) and its subsequent posture now that the issue can be somehow deemed *established,* if not by estoppel or waiver, by a bare showing of a sufficiency for submittal to the jury (Petition, pp. 24, 28).

There is no substance to this "fall-back" posture and Ford must bear the consequences of its *own* failure to produce critical evidence essential to its case. There is neither substance nor justification for petitioner's prayer of this Court that it grant certiorari, reverse and remand so that Ford can have an additional attempt at proving "the effect of defendant's conduct on interstate commerce." (Petition, p. 41.)

CONCLUSION

As there is in this case no appropriate basis for invocation of this Court's discretionary review powers, it being simply a case of Ford having failed to carry its burdens of proof by eliciting adequate evidence to support a finding on interstate commerce involvement, and, inasmuch as the petitioner is not even a party who has statutory standing to request the issuance of a writ of certiorari for review of any part of this case, Fibreboard respectfully asks that this Honorable Court deny the instant petition.

Dated: August 9, 1974.

Respectfully submitted,

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